SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 874

MAX LOUIS PESKOE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RALPH L. FUSCO,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The Petitioner, Max Louis Peskoe, respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered on November 14, 1946 (134).

Statement of the Matter Involved

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

The petitioner was convicted upon a charge of having violated the Selective Training and Service Act of 1940, as

amended.[1] The indictment was returned February 6, 1945 (1a). The petitioner was convicted at a trial held in June, 1945, but the verdict was set aside and a new trial granted 2. It is on the conviction at the subsequent trial and the affirmance thereof, by the Circuit Court of Appeals (134) that this petition is based.

The facts as they relate to the charge appear to be uncontroverted. They are as follows:

On May 12, 1941, the petitioner received a questionnaire; in reply thereto, petitioner sent the following letter:

(Ex G-1A Offered 24) (119)

"May 14, 1941.

Local Board No. 2,
Middlesex County,
Raritan Township,
Municipal Bldg., Lindeneau,
R. D. 19, New Brunswick, N. J.

GENTLEMEN:

I wish to advise that at the present time I hold a commission of Second Lieutenant in the inactive reserve of the U. S. Army, having secured this commission after the completion of four years of R.O.T.C. at Rutgers University in 1929.

I believe this information will eliminate the necessity for filling out the enclosed form.

I will be glad to furnish any further information that you may desire.

Sincerely yours,

(S.) MAX PESKOE."

MP:JD.
Enc.

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[1] 50 U. S. C. A. App. Sec. 301, etc.

In response to his letter, petitioner received the following letter from his Draft Board.

(Ex G-1AA Offered 24) (111)

"May 16, 1941.

Mr. Max Peskoe,
60 Cedar Avenue,
Highland Park, New Jersey.

DEAR SIR:

We are in receipt of your letter of the 14th relative to not filling out your questionnaire.

This Board would like to have something to substantiate your statement that you are a Second Lieutenant in the inactive reserve of the U. S. Army.

Your immediate cooperation will be appreciated.

Very truly yours,

(S.) GENE M. CRANE,
Chief Clerk."

On May 17, 1941, there was entered by the Draft Board on petitioner's questionnaire (G-1b offered 42) (112H) a classification I-C. In response to the letter of the 16th, the petitioner presented his commission granted in 1934, which by its terms was good for five years (Notice of termination of the commission was mailed to petitioner by the War Department, July 27, 1939), to Mrs. Oram, a clerk in the office of the Draft Board (42), as a result of which, on May 21, 1941 a notation was made by her on the letter of May 16, 1941, written by the Draft Board as follows:

"May 21, 1941
4 yrs. R.O.T.C. training
Rutgers
Red'd Commission 1929"

This information was presented to the Draft Board right after it was obtained (45). The next transaction was a

letter from the Draft Board to the petitioner, set forth below.

(Ex G-1C Offered 30) (113)

"February 6, 1942.

"DEAR SIR:

We would thank you to advise us of your present status since the declaration of war.

Your immediate cooperation in this matter will be greatly appreciated.

Very truly yours,

JOHN J. McCABE,
Chairman."

At the bottom of which letter is the following statement by the petitioner:

"February 10, 1942.

DEAR SIR:

My status has not been changed.

Sincerely,

MAX PESKOE."

In October, 1942, petitioner notified the Draft Board of his change of address (61).

The petitioner was reclassified I-A on July 11, 1944, after receipt by Draft Board of a letter, in answer to its query, that the petitioner's commission had expired in 1939 (34), and later reclassified II-A on November 4, 1944 (Ex. G-1B 112H offered 10, 24).

Section 311 of the Act, upon which this indictment is based, describes seven substantive offenses,[2] under which clauses 2 and 3 appear to have any relevancy:

> "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act,

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[2] 50 U. S. C. A. App. Sec. 311. See *Singer* v. *United States*, 323 U. S. 338, 341 (1945).

> or the rules or regulations made or directions given thereunder, (1) . . . (2) who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and (3) any person who shall knowingly make, or be a party to the making of, any false statement, or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, . . . shall, upon conviction in the District Court of the United States having jurisdiction thereof, be punished. . . ."

The indictment alleges a violation of the Act, in that the letter of February 10, 1942 was written to induce the Draft Board to give and allow the petitioner a classification to which he was not entitled, having previously informed the said Board by letter dated May 14, 1941, as to eligibility and liability for military service in the manner of the letter of that date, set forth above.

At the time of his classification in May, 1941, the petitioner was married and had been for ten years (57) and would have been placed in the deferred classification III-A (60); he had been in the Officers Reserve Corps, more than six years, entitling him to be placed in classification IV-A (82-3); petitioner did not meet physical standards required by the Armed Forces (63-4); he was a necessary man in an essential occupation entitling him to be placed in the deferred classification II-A, which petitioner subsequently received in November, 1944 (34).

This Court Has Jurisdiction

This case involves "an important question of Federal law, which has not been, but should be, settled by this Court." (Supreme Court rule 38 par 5 (b).) This Court has never decided the contention first passed upon by the

Circuit Court of Appeals for the Third Circuit, relating to an interpretation of clause 3, Section 311 of the Selective Training and Service Act of 1940.[3] The clause referred to relates to the prosecution of one who knowingly makes any false statement as to his liability or nonliability for service.

Application of the determination of the question by the Circuit Court of Appeals for the Third Circuit would result in such a departure from the accepted and usual course of judicial proceedings, as to prompt a review thereof by this Court. It would allow a jury in the United States District Court to determine:

That inactive reserve means, Officers Reserve Corps;

That status means, liability or nonliability for service;

That the failure of the Draft Board to properly apply the Executive Order[4], would be grounds for convicting the petitioner;

That criminal intent was present, even though at all times the petitioner could have obtained deferment on other grounds;

That the letter of May 14, 1941, action on which was barred by the Statute of Limitations,[5] could be incorporated without reference in a subsequent letter of February 10, 1942, to sustain prosecution.

The result of such construction would subject a registrant under the Selective Service Act to a criminal prosecution and conviction if the Draft Board should improperly classify him through its own error. In this case the peti-

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[3] 50 U. S. C. A. App. Sec. 311.

[4] Executive Order 8560, October 4, 1940 • • • Volume 3, Classification and Selection • • • Section 21, paragraph 344; Selective Service Regulations (2d ed.) 622.15; C. C. H. Manpower Law Service 13.022.

[5] Statute of Limitations. 18 U. S. C. A. Supp. Sec. 582; "No person shall be prosecuted, tried, or punished for any offense, not capital, • • • unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed."

tioner said "inactive reserve"; the Draft Board erroneously concluded "Officers Reserve Corps", when it placed him in I-C.

Despite the "Two Court Ruling", this Court, to make sure that the public's natural feeling of abhorence in time of war, for persons accused of violation of the Selective Service Act, shall not produce substantial miscarriage of justice has reviewed such cases on the facts. *Bartchay* v. *U. S.*, 319 U. S. 484, 489.[6]

The Questions Presented

1. Whether petitioner was guilty of making a false statement as to his liability or nonliability to serve, under clause 3, Section 311, Selective Training and Service Act of 1940.

2. Whether letter of February 10, 1942, "My status has not been changed" constitutes a violation under said Act.

3. Whether the indictment charged any offense against the United States.

4. Whether prosecution for any alleged violation was barred by the Statute of Limitations.

Reasons Relied On for the Allowance of the Writ

1a. The indictment fails to charge an offense against the United States.

b. Clause 2 of Section 311 makes it a violation to knowingly make, or be a party to the making of any false or improper classification. There is no averment in the in-

[6] *Bartchay* v. *United States*, 319 U. S. 484, 87 L. ed. 1534 "Because the conviction involved an interpretation of an important regulation under the Selective Service Act," and in reviewing the evidence, decided that the evidence was insufficient to sustain the conviction, of knowingly failing to keep Draft Board informed of his address. • • •"

dictment that the petitioner made any improper classification or that an improper classification of him was made. This contention was sustained in the opinion of the Circuit Court of Appeals (129).

c. Clause 3 of Section 311 makes it a violation to knowingly make a false statement as to one's liability or nonliability for service. The letter of February 10, 1942 says nothing about the petitioner's liability or nonliability for service. It says "my status has not been changed".

2. There is no designation of inactive reserve or 4 years R.O.T.C. in the Executive Order[7] setting up classifications. The error of classification, if any was made, was that of the Draft Board, in improperly applying the regulations setting forth the categories under I-C.

3a. The Draft Board did not rely on the letter of the petitioner but requested him to produce evidence to substantiate his letter of May 14, 1941. It was produced in the form of a commission dated 1934 and good for five (5) years, and if any error occurred, it was by reason of the action of the representative of the Draft Board.

b. The only classification I-C made by the Board, is that shown on the petitioner's questionnaire dated May 17, 1941. There is no evidence that the Board relied on the letter of February, 1942 to continue that classification.

c. The latest information which the Board had available on which to base its classification was dated May 21, 1941. 4 years R.O.T.C. (112A) etc. If there was any reference in the letter of February 10, 1942 it would be to the last evidence submitted.

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[7] Executive Order 8560, October 4, 1940 • • • Volume 3, Classification and Selection • • • Section 21, paragraph 344; Selective Service Regulations (2d ed.) 622.15; C. C. H. Manpower Law Service 13.022.

4a. Petitioner would have been deferred at all times, by reason of his being married and his being a necessary man in an essential occupation, his having been a Reserve Officer for at least six (6) years (82-3), and by further reason of the fact that he did not meet the physical standards required by the Armed Forces (63-4).

b. When the errors in classifications were discovered and upon submission of additional proof in 1944, petitioner was classified II-a.

5. The letter of Draft Board, February 6, 1942, asks "present status since declaration of war" (December 7, 1941). There is no reference by Board to any former letters by petitioner. His reply would refer only to any change since December 7, 1941. These facts do not constitute an offense under the Act.

6. Any action based on the letter of May 14, 1941 was barred by the Statute of Limitations since the indictment was not returned until February 6, 1945 (1). Where an offense is a completed offense at the time of its commission, it cannot be revived by a subsequent letter which does not in any manner refer to it.

Respectfully submitted,

RALPH L. FUSCO,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 874

MAX LOUIS PESKOE,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered on a Per Curiam opinion on July 23, 1946. Petition for rehearing was entertained and was on November 14, 1946 denied. The opinion has not yet been reported but is printed in full in the record (127-134).

Jurisdiction

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. 347). The Circuit Court of Appeals has, in this case, decided an important question of Federal law which has not been, but should be,

settled by this Court. The Circuit Court of Appeals has, in this case, also decided a question of Federal law in a way probably in conflict with applicable decisions of this Court (*Pendergast* v. *U. S.*, 317 U. S. p. 412, 87 L. Ed. p. 368; *U. S.* v. *Irvine*, 98 U. S. 450, 25 L. Ed. 193). The decision of the Circuit Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to require (in the interest of justice) an exercise of this Court's power of supervision. (Supreme Court Rule 38 Par. 5 (b). *Bartchay* v. *U. S.*, 318 U. S. 484, 87 L. Ed. 1534. *Baumgartner* v. *U. S.*, 322 U. S. 665 at 670).

Judgment was entered in this case by the United States Circuit Court of Appeals on November 14, 1946.

Statement of the Case

There are no controverted issues of material facts. The questions involved relate:

To whether statements of the petitioner, I hold a commission in the inactive reserve; and a subsequent statement, my status has not been changed, were made with criminal intent and in violation of Section 311 of the Selective Service Act which makes it an offense to knowingly make a false statement as to one's liability or nonliability for service; and whether the running of the Statute of Limitations, commencing on May 14, 1941 was interrupted by the letter of February 10, 1942.

Errors Relied Upon

The Court below erred as follows:

1. In failing to reverse the judgment of the District Court, for its error in overruling petitioner's contention that the indictment does not charge an offense.

2. In failing to reverse the judgment of conviction for failure of the District Court to grant the motion for a directed verdict on the grounds of insufficient evidence.

3. In concluding that "The statement that the defendant held a commission of Second Lieutenant, in the 'inactive reserves of the United States Army,' after having completed four years in the Reserve Officers Training Corps might quite properly support a finding by a jury that the defendant had stated to his local Board that he held a commission of Second Lieutenant in the Officers Reserve Corps."

4. In concluding that "The jury was entitled to find and apparently did find, that when the defendant sent his February, 1942, letter, he reasserted the false statement originally made by him in the May 1941 letter."

5. In failing to reverse the judgment of the District Court for its error in overruling petitioner's motion to set aside the judgment on the ground that there was a lack of criminal intent.

6. In failing to reverse the judgment of the District Court for its error in overruling the defendant's motion to quash on the ground that prosecution was barred by the Statute of Limitations.

Points of Law

Point I

The indictment fails to charge an offense against the United States.

Point II

There is no designation of inactive reserve or 4 years R. O. T. C. in the executive order setting up classification. The error of classification was that of the Draft Board in improperly applying the regulations setting forth the categories under I-C.

Point III

There was no reliance by the Draft Board on the letter of May 14, 1941.

POINT IV

There is no evidence of any intent to commit a crime since the petitioner would have been deferred for other reasons during all of this period.

POINT V

The letter of February 10, 1942 refers, and is in answer to the letter of the Draft Board, dated February 6, 1942, wherein its asks "Present Status Since Declaration of War" (December 7, 1941).

POINT VI

Action on the letter of May 14, 1941 was barred by the Statute of Limitations since the indictment was not returned until February 6 (1).

ARGUMENT

For the purpose of clarity, the points enumerated under the argument follow the same order as the reason urged in the petition. Briefly put, it is the contention of the petitioner, that there was never any statement made as to liability or nonliability for service under the Act. Nowhere in Section 305 of the Act, is one exempted or relieved from military service by his holding a commission in the "inactive reserve of the United States Army," nor does the Executive Order designating the categories under the classification I-C set forth "inactive reserve." If there was any error, it was that of the Draft Board in improperly applying the Act, and the Executive Order based thereon.

There is clearly no evidence of any criminal intent, since the petitioner, and it is conceded, as held by the Circuit Court of Appeals in its opinion "He might at that time have requested a deferment upon several grounds. He was living with his wife to whom he had been married in 1931 and who depended upon him for her entire support. His eyesight

was below the standards established by the Army for acceptance of men into the service. He was engaged in an essential occupation, so treated by his own board since at least one of his employees who was registered with the same board had been and was continuously deferred for the duration of the war by reason of his occupation" (77). In addition he might have been placed in category IV-A for he served at least six years in the Officers Reserve Corps (82-3).

If for the purpose of this argument, we concede that his letter of May 14, 1941 constitutes an offense, an action thereon was barred by the Statute of Limitations and the later letter of February 10, 1942 cannot be used to toll the Statute.

Point I

The indictment fails to charge an offense against the United States.

The contention of the petitioner that no offense is charged under clause 2 of Section 311 [8] was sustained by the Circuit Court of Appeals in its opinion (129).

The indictment fails also, to charge an offense under clause 3 of Section 311.[9] To charge an offense under this clause, it is necessary to allege that the defendant knowingly made a false statement as to his liability or nonliability for service. The indictment does not allege that the 1942 letter referred to petitioner's liability or nonliability

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[8] 50 U. S. C. A. App. Sec. 311 • • • "who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster."

[9] 50 U. S. C. A. App. Sec. 311 • • • "any person who shall knowingly make or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto."

for service, but merely states that he intended to obtain an improper classification thereby. The indictment contains no averment as to his liability or nonliabilty. The terms classification and liability are separate and distinct and are so recognized in the Statute for each constitutes a separate offense. Nonliability for service refers to an exemption or exclusion from military service such as that accorded to certain public officials, fully ordained ministers, aliens and the like. *Bronemann* v. *United States,* C. C. A. 8, 138 F. (2d) 333, 336. Classification refers to the order in which men were placed subject to being called to the service.

Judge Schwellenbach speaking for the District Court in Washington, in the case of *U. S.* v. *Raymond,* 37 F. Supp. 957, wherein the defendant was indicted and charged with representing himself to be a citizen of the United States to members of his election Board, for the purpose of being permitted to vote although he knew he was not a citizen, held that the indictment was defective, because it did not charge that the accused knew he was not entitled to vote unless he was a citizen and represented himself to be a citizen to deceive the election Board. He held too, it is universally recognized that for a representation to be fraudulent it must be made concerning a material fact with knowledge of its falsity and with intent to deceive.

> "The criminal intent of the accused must be alleged where the criminality of the act depends on the intent with which it was done." 27 Amer. Jur. pp. 631, 632. "Intent is always vital when fraud is in issue, U. S. v. Shurtleff, 43 F. 2d 944, C. C. A. 2d."

Since the indictment thus fails to allege an offense against the United States, the conviction herein should be reversed. *United States* v. *Max,* C. C. A. 3, decided May 22nd, 1946.

Point II

There is no designation of inactive reserve or 4 years R. O. T. C. in the executive order setting up classifications. The error of classification was that of the Draft Board in improperly applying the regulations enumerating the categories under I-C.

The Selective Service Regulations by which Draft Boards were to be guided were set up by Executive Order #8560. Section XXI of said Order set up "Class One: Available for Service." • • • Section 344 provides:

> "Class I-C: Member of land or naval forces of United States.—a. In Class I-C shall be placed every registrant who is, or who by induction or enlistment becomes, a commissioned officer, warrant officer, field clerk, pay clerk, or enlisted man of the Regular Army, the Navy, the Marine Corps, the Federally recognized active National Guard, the Officers' Reserve Corps, the Regular Army Reserve, the Enlisted Reserve Corps, the Naval Reserve, or the Marine Corps Reserve; or a cadet of the United States Military Academy; or a midshipman of the United States Naval Academy; or a man who has been accepted for admittance (commencing with the academic year next succeeding such acceptance) to the United States Military Academy as a cadet or to the United States Naval Academy as a midshipman, but only during the continuance of such acceptance.[10]

Under Section 305 (a) certain persons were not required to be registered and were relieved from liability for training and service. Section 305 (b) exempted from training and service in peacetime persons therein described, and

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[10] Executive Order 8560, October 4, 1940. • • • Volume 3, Classification and Selection • • • Section 21, paragraph 344; Selective Service Regulations (2d ed.) 622.15; C. C. H. Manpower Law Service 13.022.

Section 305 (c) likewise deferred persons in other categories. Nowhere in Section 305 is one exempted or relieved from military service by virtue of his holding a commission in the "Inactive Reserves of the U. S. Army."

The effect of stating that one held such a commission is not a statement as to liability or nonliability for service under the Act, nor is the statement that one holds such a commission cause for deferment. Such a person is neither exempted nor deferred by any provision of law from training and service. A false statement relating to liability or nonliability for service under clause 3 is one which, if true, would exempt the maker from service. Thus one who falsely states that he is one of the public officials who by law are exempt from service, or that he is a minister or alien, who likewise are exempt by law, when in fact he is not, offends the Statute because he states in effect that he is not liable for military service. But one who makes a statement which is not true but which, were it true, nevertheless would not exempt him from military service, has not made a false statement within the intendment of the statute. Thus, if instead of making the statement which he did, petitioner had said that he was a cadet at Virginia Military Institute (cadets at the United States Military Academy are exempt by law), or had said that he had served for two years in the Regular Army (those with three years service are exempt), or that he was a justice of the peace (only judges of courts of record are exempt), his statement would not be false within the terms of the Act, for despite such statement the maker would still be liable for service and would not gain exemption thereby. The statement made by petitioner that he held a commission in the In-Active Reserves of the United States Army is in the same category as the examples just cited, for even were it not inaccurate it would not constitute a statement affecting his liability for service. Such a person is not exempt by law.

Point III

There was no reliance by the Draft Board on the letter of May 14, 1941.

The criteria of fraud evoked in civil cases are applicable in criminal prosecutions. *Foshay* v. *U. S.*, C. C. A. 8, 68 F. (2d) 205 at 211.

> "Discussion of what amounts to fraud is found in greater volume in the reports of civil cases, but the principles are no different * * *."

Mr. Justice Lamar in speaking for this court on the question of fraud in *Southern Development Co.* v. *Silva*, 125 U. S. 247 at 250, 85 S. Ct. 881 at 882, 31 L. ed. 678 at 680 said:

> "In order to establish a charge of this character the complainant must show, by clear and decisive proof:
>
> "First. That the defendant has made a representation in regard to a material fact;
>
> "Secondly. That such representation is false;
>
> "Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;
>
> "Fourthly. That it was made with intent that it should be acted on;
>
> "Fifthly. That it was acted on by complainant to his damage; and,
>
> "Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

In *Knauer* v. *U. S.*, 66 S. Ct. 1304, 90 L. ed. 1195, this court held, "Fraud connotes, perjury, falsifications, concealment and misrepresentation."

The fifth element set forth in the *Silva* case *supra* in a criminal prosecution implies reliance. Clearly there was none in the case at hand. The letter of the Draft Board of May 16, 1941 "This Board would like to have something to substantiate your statement" (G-1AA 111 offered 24) is proof of this fact.

The evidence requested was produced on May 21, 1941 in the form of a commission as Second Lieutenant date 1934 which by its terms was good for five years. The person in charge of the Draft Board office examined and returned the certificate to the petitioner. The information she obtained was made available to the Draft Board; "Right after we got it, it would have been presented" (45). There was no way for the petitioner to know what the clerk submitted to the Board. He had a right to rely on the agents of the Board.

Considering the letter of February 10, 1942, if there is any vice therein, no evidence has been adduced to show that the Board relied on it in continuing the classification.

The only evidence is a classification on May 17, I-C and a reclassification on July 11, 1944 I-A and a subsequent reclassification Nov. 1, 1944 II-A.

The Circuit Court of Appeals in its opinion observed that the petitioner wrote that he held a commission of Second Lieutenant in the "In-Active Reserves" using In, a hyphen, and then Active, with the thought, it appears to us, that there was an attempt to use the In as a preposition, suggesting the fact that the petitioner was in the active reserves. In fact the petitioner in his letter wrote "in the inactive reserve" (Ex G-1A offered 24) (130), clearly indicating the single word inactive. As stated in the petitioner's testimony "he used the word inactive so that they would specifically know he did not mean active service" (64).

Point IV

There is no evidence of any intent to commit a crime since the petitioner would have been deferred for other reasons during all of this period.

The Court erred in refusing to direct a verdict at the end of the case because the defendant's acts were not motivated by a criminal intent.

An offense is not committed under Section 311 unless the acts or statements made or issued are accompanied by a criminal intent. *United States* v. *Hoffman*, 2 Cir., 137 Fed. (2d) 416, 419. Assuming that the statement contained in the letter of May, 1941 was untrue, this question nevertheless remains: Did the defendant write the letters of May 1941 and February 1942 to evade service by obtaining an improper exemption or classification [11], or did he make an honest mistake? If the evidence relating to this is as consistent with the defendant's innocence as with guilt and failed to prove wilful intent, the motion for a directed verdict should have been granted. *Candler* v. *United States*, 5 Cir., 146 Fed. (2d) 424, 426.

It is important to note that because of his marital status, physical condition, and occupation, the defendant would have been entitled to deferment and would not have been called for training and service. It is inconceivable that one so situated would seek an improper classification or speak falsely of his liability for service when in fact without such a statement he would have been deferred from service.

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[11] Our argument applies whether the indictment is construed as alleging an offense under clause 2 or clause 3 of Section 311, as we have numbered it, *supra*.

The Selective Service Act was primarily conceived as a training program [12]. Congress fixed a maximum number to be trained at 900,000. This was reduced to 800,000 by limitations of appropriations [13]. Those who had completed training were placed in Reserves [14]. Because of limitations of law and facilities, it was undesirable to train men qualified in military science.

Of the 17 million who registered by December 1941, over 12 million had been deferred with more than 10 million being placed in Class III-A in order to preserve the family life [15].

> "It was felt to be socially desirable that the family as the foundation social institution should be maintained . . . while the financial problem was the main one, the spiritual relationship and dependence was not to be entirely disregarded . . ." [16].

In the actual process of classification the following procedure was followed:

> "We ask ourselves 'Is this registrant deferred by law by virtue of the position he holds?' 'Has he dependents?' 'Does his occupation warrant us leaving him here rather than sending him into the Army?' If these questions are answered in the affirmative, the registrant is placed in one of the deferred classes." [17]

Only those men who were acceptable because they were mentally, physically and morally fit and had no claim for

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[12] Fitzpatrick, Universal Military Training, McGraw-Hill Book Company, 1945, page 319; Selective Service in Peacetime, First Report of the Director of Selective Service to the President, 1940-1941, page 46.

[13] Selective Service in Peacetime, page 122.

[14] Selective Service in Peacetime, id. pages 26-35.

[15] Selective Service in Peacetime, id. page 137.

[16] Selective Service in Peacetime, id. page 137.

[17] Selective Service in Peacetime, id. page 126.

deferment were inducted [18]. The minimum visual requirements were 20/40 or better [19].

The purpose of the act and the policies followed were given wide publicity. Petitioner heard that the purpose was to train as many untrained men as possible, implying to him that a trained man was not to be retrained (59). He had been married since 1931 (57) so because of his wife's dependency he would be deferred, even had he not been previously trained. He would have been deferred as a necessary man in an essential business as were his employees (77). He knew his eyes were 20/80, which was below Army standards [20].

It is inconceivable that petitioner wrote the letters of May 1941 and February 1942 to evade service. In the May 1941 letter he said "Inactive Reserve" so that the Board would know he was not a member of an Active Reserve Corps (68). This way of expressing himself is a misconception and not a false statement as to his eligibility for service. He did not state that it was his belief that he was not obliged to serve his country. In the light of what he had read and heard he expressed the belief not that he should not serve, but that he was not obliged to fill out the questionnaire. He volunteered to furnish any information which the Board might desire in connection with his statement. No one deliberately making a false statement with an improper motive would volunteer to expose himself to inquiry.

Nor is it reasonable to suppose that one committing or intending to commit an offense would not seek to perpetuate his criminal act, given the opportunity to do so. When the petitioner completed his questionnaire he merely

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[18] Selective Service in Peacetime, id. page 110.

[19] Selective Service in Peacetime, id. page 213.

[20] Selective Service in Peacetime, id. page 213.

stated that he had had four years of R. O. T. C. at Rutgers University. He completely left blank series XIII which asked for information concerning "Present Members of Armed Forces," and did not state that he held a commission in the In-Active Reserves for no such designation appears in that series. Had he intended to convey the impression that he held an existing commission in the Officers Reserve Corps he would in all likelihood have completed Series XIII. The fact that he did not is persuasive evidence that he did not intend to mislead the Draft Board.

That he was entitled to deferment at all times is clear. When, in 1944, the War Department, in reply to an inquiry from the Draft Board, informed the Board that his commission had expired in 1939, he received an occupational deferment after he had been placed in Class I-A (35).

It is evident that the petitioner was not motivated by a desire to evade service, since he would not have been called to serve because of his various reasons for lawful deferment. In the absence of such motive it cannot be said that he possessed or acted with criminal intent. In the absence of such an intent the motive for a directed verdict should have been granted.

Point V

The letter of February 10, 1942 refers, and is in answer to the letter of the Draft Board, dated February 6, 1942, wherein it asks "Present Status Since Declaration of War" (December 7, 1941).

Finding that the petitioner could not be prosecuted for his act of May 14, 1941 (we do not concede that this act constituted an offense) attention was focused on the letter of February 10, 1942, and an attempt was made to bring this within Section 311. As we read the indictment the

offense charged against the petitioner falls within clause 2 of that section. The indictment contains no averment that an improper classification of petitioner was made, and consequently does not charge the offense described in the second clause. This contention of the petitioner was sustained by the Circuit Court of Appeals (129).

There is further no averment in the indictment that the petitioner knowingly made any false statement as to his liability or nonliability to serve, as required under clause 3 of this section. There is no allegation that the February 10, 1942 letter referred to the petitioner's liability or nonliability for service. The indictment merely states that he delivered a letter to his Draft Board with the intent that the Board might be induced to allow the petitioner a classification to which he was not entitled. The terms liability or nonliability and classification are separate and distinct, and the statute so recognizes them. Liability or nonliability for service refers to those who are subject or excluded from service and training, whereas classification refers to the order into which registrants would be placed.

The letter of February 10 is actually a true statement. It cannot form a basis of a charge. The February 6th letter asked the petitioner to advise the Board of his status "since the declaration of war." Actually since that time his status had not changed. He was still living with his wife, his occupation was unchanged and his physical condition was the same. This same interpretation of status was used by the Draft Board as shown by the testimony of one of its members, Mr. Segoine. "Q. Now, in May 1941 down to March 1942, how did your Board classify married men? A. That all depended on their status, children, jobs, a dozen things" (36). His statement "my status has not been changed" was true and no offense was committed.

The Court below recognized this in this charge:

> "If you find from the evidence that the defendant on February 10th, 1942 did not represent to his Draft Board that he was one of the persons who was exempt by law from training and service under the Selective Service Act, then your verdict must be not guilty" (105).

POINT VI

Action on the letter of May 14, 1941, was barred by the Statute of Limitations since the indictment was not returned until February 6, 1945 (1).

The indictment was returned on February 6, 1945 (1). The prosecution of the petitioner under the indictment was barred by the Statute of Limitations,[21] since the Act constituting the offense occurred more than 3 years next before the return of the indictment.

Unless the exception is written into the terms of the statute that nondiscovery, nondisclosure or concealment, shall toll or interrupt its running, the statute begins to run at the time of the offense, and continues to run without interruption to the point of final bar, irrespective of nondisclosure or affirmative acts of concealment on the part of the accused; and no court can write into such a statute exceptions which do not therein appear.

This contention was sustained by the Supreme Court in *Pendergast* v. *United States*, 317 U. S. 412, 87 L. Ed. 368, an action for contempt of court, in an opinion by Mr. Justice Douglas, wherein it held:

> ". . . we are of the opinion that this prosecution was barred by Section 1044 of the Revised Statutes.

[21] 18 U. S. C. A. Supp. 582: "No person shall be prosecuted, tried, or punished for any offense, not capital * * * unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed."

"It would seem that the Statute fits this case like a glove . . ."

"If there is a contempt, it takes place when the 'misbehavior' occurs in the 'presence' of the court. Statutes of Limitation normally begin to run when the crime is completed. See United States vs. Irvine, 98 U. S. 450, 25 L. Ed. 193 . . .

". . . the mere continuance of a fraudulent intent after an act of 'misbehavior' in the 'presence' of the court, does not make that 'misbehavior' a continuing offense under Sec. 268. The misrepresentations to the court made possible, of course, the consummation of the nefarious scheme. But each subsequent step in the scheme did not constitute a contempt unless, like the misrepresentation itself, it was 'misbehavior' in the 'presence' of the court or 'so near thereto as to obstruct the administration of justice'. The fact that the scheme was fraudulent and corruptly obstructed the administration of justice does not enlarge the limited power to punish for contempt . . . We are forced to conclude that any contempt committed occurred not later than February 1, 1936, when the court ordered the distribution of the impounded funds. It was therefore barred by the Statute of Limitations."

Conclusion

It is respectfully submitted that, for the reasons hereinabove stated, petitioner's petition for a Writ of Certiorari should be allowed. It appears that the specific question presented has not heretofore been passed upon by this Honorable Court. The decision of the Circuit Court of Appeals for the Third Circuit, adverse to petitioner's contention relative to the construction of that portion of the statute discussed, is the only ruling upon this specific question handed down by any Circuit Court of Appeals. The decision is contrary to the fundamental precepts of our Judicial system, to permit a jury to determine as a question of

fact that the words "inactive reserve" mean Officers Reserve Corps, and to permit the Court to determine that the Statute of Limitations was tolled on an act which in itself was completed offense by the performance of a subsequent act without reference to the former.

Respectfully submitted,

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CITATIONS

730874—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 874

MAX LOUIS PESKOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial per curiam opinion of the circuit court of appeals affirming petitioner's conviction (R. 121) is not reported. The opinion of the court on rehearing (R. 127–134) is reported at 157 F. 2d 935.

JURISDICTION

The final judgment of the circuit court of appeals was entered November 14, 1946 (R. 134; see also R. 121–122, 126). On December 3, 1946, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Burton

to January 13, 1947 (R. 135), and the petition was filed January 10, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the indictment charges an offense under Section 11 of the Selective Training and Service Act.

2. Whether the evidence is sufficient to support petitioner's conviction of knowingly and falsely informing his draft board that he held a commission in the Inactive Reserve of the Army, whereby he obtained an exemption from training and service under the Act.

3. Whether the prosecution is barred by the statute of limitations.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set forth in the appendix, *infra*, pp. 17–21.

STATEMENT

On February 6, 1945, petitioner was indicted in the United States District Court for New Jersey in one count charging a violation of Section 11 of the Selective Training and Service Act (R. 1, 3–4). The indictment alleged that petitioner, as a registrant under the act, had a duty honestly and

truthfully to inform his local board of his true and correct status, and that with intent to induce the local board to place him in a classification to which he was not entitled, petitioner, on February 10, 1942, did

> wilfully knowingly and feloniously and contrary to his said duty, send, transmit, and deliver and cause to be sent, transmitted and delivered to the said Local Board Number 2, a certain letter in the following tenor and effect, to wit:
>
> "FEBRUARY 10, 1942.
>
> "DEAR SIR:
>
> "My status has not been changed.
>
> "Sincerely, /c/ MAX PESKOE"

having previously informed the said Local Board Number 2 by letter under date of May 14, 1941 as to his eligibility and liability for military service in the following manner, to wit:

> "MAY 14, 1941.
>
> "Gentlemen:
>
> "I wish to advise that at the present time I hold a Commission of Second Lieutenant in the In-Active Reserves of the U. S. Army, having secured this Commission after the completion of four year R. O. T. C. at Rutgers University in 1929. I believe this information will eliminate the necessity of filling out the enclosed form. I will be glad to furnish any further information that you may desire.
>
> "Sincerely yours,
>
> /s/ MAX PESKOE."

> which said letter was false and untrue and well known to the said Max Louis Peskoe to be false and untrue in this, that the said Max Louis Peskoe did not hold a commission of Second Lieutenant on May 14, 1941, the said Max Louis Peskoe having been advised by the War Department that his commission of Second Lieutenant had terminated on July 24, 1939; * * *.

Petitioner was convicted after a jury trial, and he was sentenced to imprisonment for one year and one day (see R. 2). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the judgment was first affirmed on July 23, 1946, in a *per curiam* opinion (R. 121–122). Thereafter, a petition for rehearing (R. 122–125) was granted (R. 126), the case was reargued (R. 126), and on November 14, 1946, the court rendered a full opinion again affirming the judgment (R. 126–134).

As petitioner states (Pet. 2), the material facts are not in dispute. Petitioner is a member of the bar of New Jersey, but he has not actively practiced law (R. 65). Instead, he is engaged in the wholesale automotive parts business (R. 57). In 1929 he was graduated from Rutgers University, where he was a member of the Reserve Officers Training Corps, and shortly after his graduation he was commissioned a Second Lieutenant of Infantry in the Officers' Reserve Corps of the Army (R. 58). The commission

was for a term of five years and it was renewed in 1934 (R. 58, 116–117). It appears from petitioner's service record that on July 27, 1939, he was notified by the Adjutant General's Office that his commission had expired and that since he had not qualified for reappointment, it would not be renewed (R. 120, 51–52). He was never at any time appointed a Second Lieutenant in the Inactive-Reserve provided for by paragraph 6 *a* (19) of Army Regulations 140–5, *infra*, pp. 18–21.

After the enactment of the Selective Training and Service Act, petitioner registered with Local Board No. 2, County of Middlesex, New Jersey (see R. 7-8). On May 12, 1941, the local board forwarded to petitioner the selective service questionnaire (R. 8). On May 14, petitioner returned the questionnaire without filling it in and submitted to the local board the letter of that date set out *in haec verba* in the indictment, *supra*, p. 3 (R. 119). On May 16, the board requested petitioner "to substantiate your statement that you are a Second Lieutenant in the inactive reserve of the U. S. Army" (R. 111). In the meantime, on May 17 the local board classified petitioner I-C, the classification for members of the armed forces, including commissioned officers in the Officers' Reserve Corps (R. 8, 112H).[1] On

[1] A member of the local board testified that he interpreted petitioner's letter as meaning "that he is a commissioned officer and that the board has nothing further to do with him" (R. 26). An officer commissioned in the inactive re-

May 21, 1941, in response to the board's letter of the 16th, petitioner appeared at the board's office and exhibited to one of the clerks his commission (R. 39, 116-117), which showed on its face that it had expired in 1939. The clerk noted on the board's letter of May 16 the facts that petitioner had been in the Reserve Officers' Training Corps for four years and that he had been commissioned in 1929 (R. 39, 111). Petitioner was thereafter retained in I-C (R. 112H).

Nothing further occurred until February 6, 1942, when the local board requested petitioner "to advise us of your present status since the declaration of war" (R. 113). Petitioner responded with his letter of February 10, 1942, *supra*, p. 3, stating, "my status has not been changed" (R. 113). On February 25, 1942, the local board wrote petitioner that his selective service questionnaire was "incomplete" and requested that the call at the board's office "to clarify this situation" (R. 113). A clerk of the local board testified that petitioner appeared at the board's office on March 5, 1942, and filled in the questionnaire (R. 41–42, 112A–112H).[2]

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serve provided for by par. 6 *a* (19) of Army Regulations 140–5, *infra*, pp. 18–21, would of course be a member of the Officers' Reserve Corps.

[2] Petitioner disputed this aspect of the Government's evidence. He testified that when he received the letter of May 16, 1941, from the board requesting substantiation of his claim that he was a Second Lieutenant, his questionnaire was returned to him, and that he completed it at that time and

Petitioner remained in I–C from May 17, 1941, until July 11, 1944, when, on the basis of information requested by the local board from the War Department showing that his commission in the Officers' Reserve Corps had expired in 1939, the board reclassified him I–A (R. 32–34, 114–115, 112H). Thereafter, petitioner applied for an occupational deferment (R. 115–116), and on November 1, 1944, he was reclassified II–A, as a person engaged in a business which was essential to the war effort (see R. 34).

ARGUMENT

1. The indictment purports to charge a violation of the third clause of Section 11 of the Selective Training and Service Act, which provides for the punishment of any person

> who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations or directions made pursuant thereto.

Petitioner urges that the indictment fails to

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returned it to the local board (R. 59–60). Petitioner explained the date March 5, 1942, which appears in the jurat at the end of the questionnaire (R. 112G) on the basis that the jurat was not signed at the time he returned the questionnaire in May 1941, and that a local board clerk signed it, without petitioner being present, on March 5, 1942 (R. 60–61).

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charge this offense because, although it alleges that he made a false statement to the local board for the purpose of obtaining an incorrect classification, it does not allege that the false statement was related to his liability or nonliability for military service. Petitioner's argument runs as follows: The second clause of Section 11 (*infra*, p. 17) proscribes the making of a false statement whereby an incorrect classification is obtained and the third clause relates to making a false statement to establish liability or nonliability for service under the Act, i. e., to establish an exemption or exclusion from service as distinguished from a deferment. Since the indictment does not allege that petitioner obtained an incorrect classification, petitioner urges, and the court below agreed with him (R. 129), that it does not charge the offense defined in the second clause. And since the indictment alleges that petitioner made the false statement to "induce and persuade the said board to place the said Max Louis Peskoe in a classification to which he was not lawfully entitled," it is argued that the false statement was alleged to have been directed to obtaining a deferment and not to obtaining an exemption, and thus an offense under the third clause is not alleged. (Pet. 15–16.)

The fundamental difficulty with this argument is that it misapprehends the offenses described in the second and third clauses of Section 11. In

our view, the second clause has no application to this case; it punishes certain conduct by persons who are charged with carrying out duties in the administration of the act, such as local board members, clerks and doctors, and does not extend to registrants under the act. The third clause, on the other hand, as the court below held, punishes any material false statement made by any person, whether or not a registrant, with respect to the fitness or unfitness or liability or nonliability of a registrant for service under the Act.

Both the persons included and the act proscribed in the second clause require this construction. The opening words of the second clause—"any person charged with such duty or having and exercising any authority under the Act"[3]—plainly refer to the person described in the first clause—"any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder"—and to anyone else participating in selective service functions. The quoted words of the first clause aptly describe the persons connected with the Selective Service System who are charged with duties in the adminis-

[3] The opinion of the circuit court of appeals, which quotes part of the second clause (R. 128), does not quote these words, which we think are vital. The court assumed that the second clause could be applied to a false statement by a registrant whereby an incorrect classification is obtained, without discussing this aspect of the question.

tration of the Act. It is the sixth clause which reaches a registrant who fails to perform a duty required of him under the Act. Our position is also supported by the nature of the acts which are described in the second clause; the words of the clause—"false, improper or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster"—describe the various acts of selective service personnel in respect of a registrant.

This construction removes the foundation upon which petitioner's argument rests. But there is another consideration as well. There is no basis for distinguishing, as petitioner seeks to do, between a false statement which is directed to an exemption and one which relates to a deferred classification. A registrant receives a classification whether he is found to be exempt from military service or to be eligible for deferment. Thus, a minister of religion is exempt from service and is classified IV–D (Selective Service Reg. 622.44); a person employed in an essential occupation is deferred and is classified II–A (Selective Service Reg. 622.21). The third clause, we think, is designed to reach any person who makes a material false statement to persons or agencies which participate in the classifying process to induce a registrant's classification in a classification other than that in which he should be placed, regardless of whether it is a deferred or exempt classification.

The indictment clearly charges that petitioner made such a statement and thus, we submit, charges an offense proscribed by Section 11 of the Act.

2. Petitioner does not deny that he was informed by the War Department in 1939 that his commission in the Officers' Reserve Corps had terminated. Nor does he deny that he informed his local board in May 1941 that "at the present time I hold a commission of Second Lieutenant in the inactive reserve of the U. S. Army" (R. 119). He reasserted this same claim in February 1942, when, in response to the local board's inquiry, he informed the board that "My status has not been changed." His only apparent purpose in making these statements was to induce the board to classify him in a classification other than I–A. Otherwise his assertion that his status as a commissioned officer relieved him of the obligation to fill in the selective service questionnaire was meaningless. That petitioner accomplished his objective is evident from the fact that immediately after he falsely informed the board as to his military status he was classified in I–C and he retained that classification through the greater part of the war, from May 17, 1941, to July 11, 1944. The jury was instructed that before they could convict petitioner they must find that he knowingly made the false statement to the board with intent to deceive it as to his liability for service (R. 103–105). We submit

that the evidence amply supports the jury's verdict. Cf. *United States* v. *Virzera*, 149 F. 2d 188 (C. C. A. 2), certiorari denied, 326 U. S. 721.

Petitioner, however, attacks the sufficiency of the evidence in several particulars which we think do not require extended discussion.

a. He argues (Pet. 12–18) that his false statement was not material to his liability for service, because there is no provision in law for exempting or deferring from service one who is in the "inactive" reserves, as he represented himself to be. But the Officers' Reserve Corps had an Inactive Reserve section for those who for a number of reasons were unavailable for active duty; therein were included officers past the retirement age, or who had served 15 years in the Reserve Corps, or who had become physically disabled in line of duty. See paragraph 6 *a* (19), Army Regulations 140–5, *infra*, pp. 18–21. The Inactive Reserve did not, however, include men such as petitioner whose appointments had been terminated; such individuals were no longer members of the Officers' Reserve Corps. It was, therefore, perfectly reasonable for the local board to interpret petitioner's representation as meaning that he still held a commission as a Second Lieutenant in the Officers' Reserve Corps, of which petitioner had been a member for a number of years, but in which he was no longer active. The fact is that the board did so understand peti-

tioner's representation, and it therefore classified him I–C (see R. 26). Notwithstanding the facts that petitioner enjoyed this classification for more than three years and that he knew he was not in any way affiliated with the armed forces, he did nothing to advise the board that it had misinterpreted his representation, as he now claims. In the circumstances, petitioner is hardly in a position to urge that the jury could not reasonably conclude that his false representation was related to his liability for service under the Act.

b. Petitioner's argument (Pet. 19–20) that the local board did not rely on his false representation is patently without merit. The facts show that immediately upon receipt of his letter of May 14, 1941, the board classified him I–C, even before he appeared at the board to substantiate his claim (R. 8–9, 39, 112). After the outbreak of the war, the board inquired into petitioner's status again, and on the basis of his representation that his status remained unchanged, his I–C classification was not disturbed. A member of the local board testified that petitioner was originally classified as a member of the armed forces on the basis of his May 14 letter and the certificate he later exhibited to the board clerk, which showed that he had held a commission in the Officers' Reserve Corps (R. 9). Petitioner's I–C classification was changed in 1944 only after the

falsity of his representation was conclusively established by information received by the board from the War Department. Quite plainly, but for petitioner's false representation, he would never have been classified I–C.

c. Petitioner also argues (Pet. 21–24) that there is no evidence of any criminal intent on his part, because he probably would have been deferred from service in any event because he has defective eyesight, he was engaged in an essential activity, and his wife is dependent upon him for support. But the short answer to this argument is that in May 1941, he did not know whether he would be deferred on any of those grounds. And, assuming that he would have been, a deferment is not permanent; the local board could have withdrawn it as conditions changed. On the other hand, the I–C classification which he obtained meant that he would not be drafted so long as the board believed he held a commission. Qualitatively, the I–C classification was preferable to a possible deferment. At least, in judging petitioner's intent, the jury under proper instructions (see R. 104–105) was entitled to find that he sought exemption as a commissioned officer from service under the Act, and its verdict demonstrates that the jury did so find.

d. Petitioner's contention (Pet. 24–26) that his letter of February 10, 1942, stating that his status

remained unchanged, was truthful and therefore furnishes no basis for prosecution, overlooks the realities of the situation. Petitioner had obtained what to him was an advantage under the Act by virtue of the false representation made to the local board in May 1941. In February 1942, after the war had commenced, the board again inquired into petitioner's liability for service under the Act, and petitioner informed the board merely that "My status has not been changed" (R. 113). In the light of what had gone before, the February letter plainly meant that petitioner still held a commission. It is true, as petitioner argues, that there had been no change in his status, but the letter perpetuated the deceit which had been practiced on the board, and it is for this that petitioner was prosecuted.

3. Petitioner urges (Pet. 26–27) that if an offense was committed, it occurred in May 1941, when he first informed the local board that he held a commission and that since the indictment was returned on February 6, 1945, prosecution is barred by the three-year statute of limitations (18 U. S. C. 582). The difficulty with this argument is that petitioner was not prosecuted for the May 1941 letter. The indictment charged, and the jury found, that he made a false representation concerning his liability for service under the Act when he sent the February 10, 1942, letter to the local board. It is true that the meaning of the

letter must be ascertained from events which occurred more than three years prior to institution of the prosecution, but the statute of limitations does not foreclose the use in a timely prosecution of evidence of events which occurred more than three years before the prosecution was instituted.

If petitioner had told his local board in February 1942 that his prior representation was false and that he did not hold an officer's commission, there can be no doubt that the board would have changed his I–C classification. As we have said, petitioner's February 1942 letter perpetuated the fraud which he first practiced in 1941, and it is thus as much a false representation as to his liability for service as was his original letter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

FEBRUARY 1947.

APPENDIX

The Selective Training and Service Act of 1940 (50 U. S. C. App., Supp. V, 301 *et seq.*) provides in pertinent part:

> SEC. 5. (a) Commissioned officers * * * of the * * * Officers' Reserve Corps * * * shall not be required to be registered under section 2 and shall be relieved from liability for training and service under section 3 (b).
>
> SEC. 11. [1] Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, [2] and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, [3] and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, [4] or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, [5] or who knowingly counsels, aids, or abets

another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, [6] or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, [7] or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, [8] or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

Army Regulations 140–5, June 16, 1936, effective July 1, 1936, provided in part as follows:

6. Authorized sections.—*a.* Members of the Officers' Reserve Corps are commissioned in sections thereof which correspond with the arms and services of the Regular Army. In addition to these, several other sections have been established in the Offi-

cers' Reserve Corps by the President's direction in which officers procured for special purposes are commissioned. The authorized sections of the Officers' Reserve Corps are listed below:

* * * * *

(19) *Inactive Reserve, Inact-Res.*

(*a*) In this section will be placed—

1. All Reserve officers who have reached the age of 64 years.

2. All Reserve officers who, upon completing 20 years' service in the Army, may apply for transfer to this section. In computing this 20 years' service, prior service in the federally recognized National Guard may be counted.

3. All Reserve officers relieved of assignment under provisions of paragraph 49, who have 15 years' satisfactory commissioned service at the time of their relief, may make application for transfer to this section.

4. All Reserve officers who, having become physically disqualified, other than through their own misconduct, to perform the duties incident to the grades held by them, may apply for transfer to this section. Such requests will be accompanied by W. D., A. G. O. Form No. 63 (Report of Physical Examination).

(*b*) Officers while commissioned in this section will not be eligible for promotion, assignment, or active duty in time of peace. No original appointments will be made in this section. The Chief of the Personnel Bureau, The Adjutant General's Office, will exercise supervision over this section.

(*c*) *1.* No officer will be promoted upon transfer to this section except as specified hereafter.

2. An officer of a grade not exceeding that of lieutenant colonel who has served the required time in grade and who meets all other requirements for promotion except satisfactory physical examination may be transferred to this section in the next higher grade, if placed in this section under (*a*) *1, 2,* or *4* above.

3. An officer reaching the age of 64 years without having attained the highest grade held by him during the World War will be transferred to this section in such World War grade.

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U. S. GOVERNMENT PRINTING OFFICE: 1947

Supreme Court of the United States

OCTOBER TERM, 1946

No. 874

MAX LOUIS PESKOE,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A REHEARING OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 874

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he Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

'he petitioner, Max Louis Peskoe, presents his petition a rehearing of his petition for certiorari in this case.

I.

Jurisdiction.

'he petition for certiorari was filed on January 10, , and was denied on March 3, 1947. This petition is within twenty-five (25) days thereafter, in accordwith Rule 33 of the Rules of this Court, following . S. C. Sec. 354.

II.

Reasons for Petition for Rehearing.

'he petition presents questions of the utmost gravity, ing to the allowable scope of the principle of con-

structive republication in prosecutions for knowingly making false statements, where the purpose is to extend the statute of limitations (18 U. S. C. Supp. § 582) and the intention to republish may be either imputed or fictitious. The questions transcend in importance the particular section of the Selective Training and Service Act, 50 U. S. C. App., Supp. V. Sec. 311, involved (see *Bartchay* v. *United States,* 319 U. S. 484) and affect the enforcement of the false claims provisions in Section 35(a) of the Criminal Code, 18 U. S. C. § 80, and in other federal statutes, in at least two major aspects:

1. Continuing misstatements;
2. Matters of opinion and judgment.

III.

Public Importance.

It is vitally important that the unprecedented crime of constructive republication be disavowed before it gains a foothold in our jurisprudence as a device for nullifying the statute of limitations, *Pendergast* v. *United States,* 317 U. S. 412, 418, and of even greater importance, that unless clear and unequivocal proof of criminal intent and guilt is presented, prosecutions of unprecise utterances as false statements knowingly made be discouraged by this Court, in the exercise of its power to supervise criminal proceedings in the lower federal courts. *McNabb* v. *United States,* 318 U. S. 332, 341. The conviction upheld by the courts below is a permanent stain on the integrity of the enforcement of the Selective Training and Service Act. It is supportable only if a laconic answer, literally true, may be expanded ad lib to support a conviction for reasserting a faulty conclusory statement made more than three years before the indictment was returned.

IV.

Miscarriage of Justice.

In addition to the public importance of the issues, great private injustice has been committed in sentencing petitioner for a year and a day for conduct that could not have been a crime, for (1) the letter of May 14, 1941 "could not support a prosecution begun on February 6, 1945, more than three years after its mailing" (R. 133, 157 F. (2) 935, 938) unless it were republished, and (2) on February 10, 1942, when a false statement is alleged to have been republished, the Draft Board either knew or had available from petitioner's disclosure all the facts on which petitioner's conclusion as to his military status was based (R. 43-45, 103).

The salient facts may be summarized as follows:

Petitioner after four years in the R. O. T. C. at Rutgers, had received a commission in 1929, which expired in 1934. It was then renewed until 1939. On May 14, 1941 he advised his Draft Board that he held "a commission of Second Lieutenant in the inactive reserve of the U. S. Army, having secured this Commission after the completion of four years R. O. T. C. at Rutgers University in 1929" (R. 23, 119). The board was not satisfied with this statement and by letter dated May 16, 1941 called for substantiation (R. 24, 111). As the court below concedes:

> "In response to this request the defendant brought with him to the office of the board on May 21, 1941, the commission which had been issued to him in 1934 and exhibited it to the clerk who interviewed him. The clerk examined the commission and then returned it to the defendant. By its terms the commission 'was to continue in force for a period of five years' from July 25, 1934. The clerk made the following notation on the May 16th letter as to the purport of the interview:

'May 21, 1941
4 Yrs R. O. T. C. training
Rutgers
Rec'd Commission 1929'

The letter with the above notation was included in the registrant's file and was available to the board members. It does not appear, however, that the clerk informed the members of the board that the defendant had exhibited a later commission than the 1929 one to which reference was made in her notation and that even this later commission expired by its terms in 1939.

"In the meantime, apparently on May 17, 1941, the board had placed the defendant in Class 1-C, a classification which was applicable to members of the armed forces. The next communication from the board was a letter dated February 6, 1942, in which appeared the following: 'We would thank you to advise us of your present status since the declaration of war.' The defendant's reply, dated February 10, 1942, consisted of the one sentence letter quoted in the indictment: 'My status has not been changed' " (R. 131-2, 157 F. (2) 935, 937).

The Court of Appeals further recognizes that petitioner might have requested deferment on the grounds of dependency, defective eye sight (20/800, R. 89) and essential occupation,[1] and that he might properly argue that "since there was no need for him to manufacture a ground for avoiding service in the light of his marital, physical and occupational circumstances, a reasonable inference would be that he wrote the two letters under a misconception as to the effect to be given a lapsed commission rather than with the intent to avoid service" (R. 132-3, 157 F. (2) at 938). However, it held that the

[1] As one with more than six years in the Officers' Reserve Corps, petitioner would have been placed in Class IV A in May, 1941 and have been exempt from service (R. 82-3).

trial judge was without authority to decide as a matter of law that defendant lacked criminal intent, and that only the jury was empowered to ascertain whether the letter of February 10, 1942, on which the prosecution was based, was intended to refer to the letter of May 14, 1941 or the interview of May 21, 1941, as though the references would be mutually exclusive. Thus, not only was there no falsification, but there was not even a genuine motive to falsify from which criminal intent could be imputed to a statement capable of innocent constructions.

V.

The Controlling Questions.

The controlling questions are whether, having regard to petitioner's course of dealing with the Draft Board:

(a) His letter of May 14, 1941, advising that he held "a Commission of Second Lieutenant in the inactive reserve of the U. S. Army" (R. 119) was a deliberately false statement of fact, as distinguished from an opinion, judgment, or conclusion, and

(b) Whether the disclosure made in the interview of May 21, 1941 could be ignored, and the letter of May 14, 1941, standing alone could be deemed republished by petitioner's letter of February 10, 1942 saying "My status has not been changed." Although the indictment (R. 3-4) is strangely silent on the point, the "republication" letter of February 10, 1942 was in response to, and at the foot of, the inquiry dated February 6, 1942 from the Chairman of the Draft Board saying "We would thank you to advise us of your present status since the declaration of war." This request would

appear to have been directed to obtaining information relating to elements of status that might have changed, such as occupation, marital status, dependency, etc., and not to defendant's military status. Petitioner's letter of February 10, 1942 was literally true in any view—there had been no change in his military status, whatever it may have been, after December 7, 1941, nor after May 14, 1941, for that matter.

Argument.

A. Since it is apparent that the Government would not have urged that the statement of May 14, 1941 was reasserted in February 1942 unless it believed that the original letter was glaringly false in fact, and the petitioner was fully aware of the falsity, we shall first demonstrate that the statement alleged to have been republished was not false in fact.

When a man must answer to the satisfaction of the Government's experts in military law a complicated status question of the mixed law and fact kind which has given rise to the doctrine of judicial immunity, at the risk of being found guilty of knowingly making a false statement by a jury neither equipped to determine the true answer and the *bona fides* of the actual answer, nor properly instructed by the Court, *a new engine of oppression is created.* Lawyers and judges may be wrong without being dishonest or knowingly making false statements. *Cf. Patterson* v. *Lamb,* 67 S. Ct. 448. As a matter of fact, although the trial judge charged the jury "I think there is no proof in the case that there was such a thing as the In-Active Reserves" (R. 103; see also R. 105), there is convincing proof to the contrary in the Brief for the United States in Opposition (pp. 5, 6, 12, 19):

> "• • • the Officers' Reserve Corps had an Inactive Reserve section for those who for a number of reasons were unavailable for active duty; • • •" (Br. in Opp. p. 12).

And while the prosecution came to the wrong conclusion in linking the letter of February 10, 1942 with that of May 14, 1941, instead of to the Draft Board's letter of February 6, 1942 to which it was appended and the interview of May 21, 1941 as well, petitioner does not impugn the prosecution's honesty or sincerity.

In the case at bar the statement allegedly republished concerned the military status of an ex-member of the Reserve Officers' Training Corps. If the facts were given in an objective test of the multiple-choice type, would no students have marked the wrong answer? Assuming that the proper designation after failure to renew a commission would be a matter on which unanimity would exist among the experts in the Judge Advocate General's Office, and that if a thousand ex-members were polled, only two or three would refer to themselves as in the "inactive reserve," or some equivalent thereof, we submit that no jury should be permitted to speculate that the blundering few had knowingly made a false statement, at least not until it had been fully and painstakingly instructed in the inherent pitfalls and dangers. *United States* v. *Route,* 33 Fed. 246 (E. D. Mo.); *United States* v. *Bittinger,* 24 Fed. Cas. No. 14599 (W. D. Mo.); *cf. United States* v. *Ballard,* 322 U. S. 78. In fact, petitioner was never in the Inactive Reserve provided for in paragraph 6 *a* (19) of the Army Regulations [Army Regulations 140-5, June 16, 1936], but he testified at the trial that he believed his ten years of commissioned status in the Officers' Reserve Corps between 1929 and 1939 gave him "inactive" status after expiration of his commission (R. 64, 68). When, as here, petitioner had made a full disclosure to the Draft Board of the facts on which

his opinion was based, at its specific request, long prior to the alleged reassertion, the injustice of treating the letter of May 14 as a false statement still outstanding, of which petitioner had "a certain and clear perception" (*United States* v. *Bittinger, supra*), is manifest.

It is significant that had petitioner been a member of the Reserve, he would have been exempt from registration under the Act, Sections 2 and 5, 50 U. S. C. App., Supp. V, Sections 302, 305. Hence his registration with the Board (R. 7-8) should have placed it upon notice that he was not in the Officers' Reserve Corps.

B. By reason of its dangerous tendency to enlarge the statute of limitations to the prejudice of defendants, the fiction of constructive republication is as pernicious as constructive contempt. An analysis of the application of this fiction emphasizes the point.

Petitioner has been convicted of the constructive crime of having reasserted by reference in February 1942, a letter of May 14, 1941 said to have been knowingly false. The indictment was returned on February 6, 1945. Prosecution for the original letter would then have been barred by the three year statute of limitations (18 U. S. C., Sec. 582). Review of the record discloses the great injustice to petitioner, the unfair enforcement of the Selective Training and Service Act, and the reprehensible circumvention of the statute of limitations for which the erroneous assumptions that there was (1) a republication (2) of an original false statement are responsible. Far from being a republication, the letter of February 10, 1942 was a good enough, indeed a complete, answer to the poorly phrased request for additional information sent on February 6, 1942. Submission of the issue of the "linkage" (R. 55) of the letters of May 14, 1941 and February 10, 1942 was indefensible. It is patent that the letter of February 10, 1942, referred to the entire complex of petitioner's dealings with the

board, including the inquiry of February 6, 1942, and the interview of May 21, 1941, and not solely to his letter of May 14, 1941.

Petitioner did not say, "My (military) status remains the same," stressing his early statement of May 14, 1941, but "My status has not been changed," stressing (1) absence of change (2) by outside agencies (3) after December 7, 1941. The variant statements are not identical in their suggestions. Although both would have been true, literally and in substance, petitioner's statement is harder to pervert.

C. Pervading the entire record is the confusion between false statements knowingly made and fraud, deceit, and misrepresentation. Notwithtsanding the Brief for the United States in Opposition, pages 13, 15, 17, the perpetuation-of-deceit analogy drawn from civil cases is mischievous. It is not enough that the answer of February 10, 1942 may have been deceptive or misleading—a man is not to be imprisoned for imprecise terminology, or a private vocabulary, or even woolly thinking. Neither is it pertinent what defendant should reasonably have believed his military status was, or how he might reasonably believe the Draft Board would interpret his letters of May 14, 1941 and February 10, 1942, or how it was interpreted by the board (R. 25-26, 31). The decisive question is what he intended—if he described his status to the best of his ability, he was not guilty as charged. Nor could he be guilty if he did not specifically intend to republish his statement of May 14, 1941. In the light of developments the Draft Board Chairman's letter of February 6, 1942, set a trap for the unwary. Although it should have been designed to elicit specific information it gave the jury a roving commission to imply (we cannot say "infer") the worst from any answer.

Section 11 of the Selective Training and Service Act so far as here pertinent applies only to persons who "*knowingly* make * * * any *false statement* * * * as to the fitness or unfitness or liability or nonliability * * * for service under the provisions of this Act * * *." (Italics supplied.) If the letter of February 10, 1942 looked beyond the inept Draft Board request, it had reference to the totality of the dealings petitioner had with the Draft Board and its employees, in the course of which all the material facts of his connection with the Officers' Reserve Corps were drawn to their attention. Review of the earlier statement in the light of the subsequent "substantiation" reveals it as a wrong characterization rather than a false statement, for the petitioner had accurately supplied the facts upon which his conclusion was based (R. 43-45, 103). Whatever misleading (not false) qualities it may have had were dissipated by petitioner's elaboration on May 21, 1941.

If the issue had been whether petitioner had obtained credit, or an extension of credit, on February 10, 1942, by means of a materially false statement respecting his financial condition (Section 14 (c) (3) of the Bankruptcy Act, 11 U. S. C., Section 32 (c) (3)) and the critical dates were the same, i. e., if on May 14, 1941, he had failed to mention a debt, and on May 21, 1941, had rectified the omission, it is unthinkable that a discharge in bankruptcy would be denied because on February 10, 1942 petitioner had told the lender his condition "had not been changed." Once the initial misleading statement had been corrected by disclosure of all the details on May 21, 1941, the mere failure of the lender's agent properly to record the interview would not keep the misleading statement alive and unmodified, and forfeit the right to a discharge. The allegedly false statement would not have remained in force and binding on the bankrupt. *Cf. Gerdes* v. *Lustgarten,* 266 U. S. 321, 326; *Crue* v. *Trimmer,* 119 F. (2) 415

(C. C. A. 6); *Schapiro* v. *Tweedie Footwear Corp.*, 131 F. (2) 876 (C. C. A. 3); *International Shoe Co.* v. *Kahn*, 22 F. (2) 131 (C. C. A. 4).

D. Thus there were two prime errors:

FIRST: Submitting the question of the *reassertion* of a *false* statement to the jury, when without speculation and with due regard for the presumption of innocence, the jury could not have resolved either issue in favor of the prosecution, and

SECOND: In creating a new crime of partial and selective (constructive) reassertion of statements without any conceivable justification except the dubious expediency of enlarging the time within which the Government may prosecute for allegedly false statements. *United States* v. *Kissel*, 218 U. S. 601, 607; *United States* v. *Irvine*, 98 U. S. 450; *Warren* v. *United States*, 199 F. 753 (C. C. A. 5).

The truthful short answer of February 10, 1942 has been distorted, rewritten and supplemented to circumvent the three year statute of limitations. The Circuit Court erred in holding that whether the earlier letter was an utterly false statement knowingly made was an issue solely for the jury. *United States* v. *Buckley*, 49 F. Supp. 993 (D. D. C.). Unless the jury might find that the letter of May 14, 1941, was incurably false, the Circuit Court could not have upheld submitting to the jury the question whether the most malignant construction should be put on petitioner's answer of February 10, 1942. Seen in its proper perspective, the letter of May 14, 1941 cannot be separated from petitioner's course of dealing with the Draft Board and deemed reasserted in the letter of February 10, 1942. The information petitioner supplied immediately following the Draft Board's request on May 16, 1941 for substantiation of his statement that he was commis-

sioned in the "inactive reserve of the United States Army" (R. 24, 111), should have effaced any misimpressions created in the Draft Board by his letter of May 14, 1941. But however misled the board may have been, petitioner's correction of the misimpression would have put his mind at ease even if he had been aware that he had mistakenly or wrongly described his military status. If unaware that he had erroneously described his status, petitioner could not knowingly have reasserted a false statement. And however blameworthy petitioner's conclusory statement of May 14, 1941 may have been, no false statement knowingly made and uncorrected survived for incorporation in the letter of February 10, 1942.

To support the conviction, so many unsupportable inferences unfavorable to petitioner must be drawn that one is at a loss to understand how denial of a directed verdict of acquittal might be sustained. The jury would have to be capable of describing petitioner's status accurately, of differentiating between a false statement and a mistaken characterization, and between the specific intention to reassert and an imputed intention. Assuming there was sufficient evidence for the jury to find that petitioner specifically intended to reassert his statement of May 14, 1941, it would have to find (a) that the statement was false, rather than a mistaken characterization or misconception; (b) that petitioner knew it was false; (c) that despite his age, his myopia, marital status, and essential occupation, petitioner's motive was to falsify; and (d) that although he had theretofore and on May 21, 1941 disclosed all the facts as to his commission he unaccountably chose on February 10, 1942 to republish only his letter of May 14, 1941.

E. If the evidence was equally consistent with the hypothesis of innocence, a verdict of acquittal should have been directed. The answer of February 10, 1942 was not a

representation that the status shown on May 14, 1941 continued but that the status (since the declaration of war) had not been changed. For its malignant construction the Government must then supply language to the effect that status as shown in May 14, 1941, still continued, and then proceed to establish *scienter* and falsity. Unfortunately for its position, the analysis of the Circuit Court and the brief in opposition was not available to the jury or the defendant. The jury was in no position to determine what a truthful answer would have been nor to evaluate the latitude that might be allowed petitioner in describing his military status. Since republication requires specific intent, the question is not what the Draft Board's letter of February 6, 1942 intended to ask (R. 31) but what petitioner thought it did, and what antecedent status he intended to say continued. The jury certainly could not be left free to pick and choose only the fragments of evidence unfavorable to petitioner, to disregard his interview and frank disclosure of the facts, and convict petitioner for having republished only such select portion of his previous statements as was arguably false, without regard to the total effect.

In the circumstances of this case, it was the clear duty of the trial judge to rule preliminarily that too many ambiguities had to be resolved against petitioner to justify submission to the jury, or else to direct a verdict of acquittal *United States* v. *Buckley,* 49 F. Supp. 993 (D. D. C.); Rule 29, Federal Rules of Criminal Procedure, 18 U. S. C. A., following Section 687; *Karn* v. *United States* 158 F. (2) 568, 573 (C. C. A. 9).

The individual injury, grievous as it is, only highlights the public concern with criminal law procedures and evidentiary standards that permit substitution of layer upon layer of inference for proof of guilty intent, and with criminal law safeguards that permit resort to the fiction

of constructive republication as a device to evade the statute of limitations. The statute of limitations embodies protections too ancient and deeply rooted in public policy for its nullification to be accepted complacently. Invocation of constructive republication as the device for nullifying its protection presents such disturbing opportunities for serious abuse as to require this Court to intervene and review the matter on certiorari.

Conclusion.

For the foregoing reasons, petitioner respectfully urges that a rehearing be granted; that upon further consideration the order of March 3, 1947, denying the petition for certiorari, be revoked; and that the writ of certiorari issue.

LOUIS NIZER,
Attorney for Petitioner.

I, Louis Nizer, counsel for the above-named petitioner, Max Louis Peskoe, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

Louis Nizer
Attorney for Petitioner.